

HONORABLE THOMAS O. RICE

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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

ELF-MAN, LLC,

Plaintiff,

vs.

RYAN LAMBERSON,

Defendant.

No. 2:13-CV-0395-TOR

DEFENDANT LAMBERSON'S
MOTION TO DISMISS PLAINTIFF'S
FIRST AMENDED COMPLAINT, OR
FOR LEAVE TO FILE SECOND
AMENDED ANSWER,
AFFIRMATIVE DEFENSES, AND
COUNTERCLAIM

March 12, 2014

Without Oral Argument

Defendant Ryan Lamberson, through his counsel Lee & Hayes PLLC, hereby
moves this Court for Orders as to the following:

DEFENDANT LAMBERSON'S MOTION
TO DISMISS PLAINTIFF'S FIRST AMENDED
COMPLAINT, OR FOR LEAVE TO FILE SECOND
AMENDED ANSWER, AFFIRMATIVE DEFENSES,
AND COUNTERCLAIM- 1

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3 1. Defendant Moves to withdraw its First Amended Answer, Affirmative Defenses
4 and Counterclaim (ECF #18) filed January 3, 2104, without prejudice and pursuant
5 to Fed. R. Civ. P. 41(a)(2), (c), and

6
7 2. Defendant Moves to Dismiss Plaintiff's First Amended Complaint (ECF #3)
8 pursuant to Fed. R. Civ. P. 12(b)(6).

9
10 3. Defendant Moves in the alternative for Leave to File a Second Amended
11 Answer, Affirmative Defenses and Counterclaim, pursuant to Fed. R. Civ. P.
12 15(a)(2), (d).

13 A. The Interests of Justice Should Allow Defendant to Withdraw its First
14 Amended Answer, Affirmative Defenses and Counterclaim without Prejudice.

15
16 Defendant moves to withdraw its First Amended Answer, Affirmative
17 Defenses and Counterclaim, so as to allow it to move for dismissal of the First
18 Amended Complaint under Fed. R. Civ. P. 12(b)(6) on the basis of the Order
19 Granting Motion to Dismiss as to that identical First Amended Complaint as entered
20 by Judge Lasnik in Elf-Man, LLV v. Cariveau et al, Case No. 2:13-cv-00507-RSL
21 in the Western District of Washington on January 17, 2014. (ECF #78 in that
22 matter). In the Alternative, Defendant requests leave to file a Second Amended
23 Answer, Affirmative Defenses and Counterclaim.

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1 This lawsuit against Mr. Lamberson was severed from the companion case
2 (Elf-Man LLC v. Brown et al, case No. 2:13-cv-00115-TOR) on November 21,
3 2013 and the new Case No. 2:13-cv-00395-TOR was created. On November 22,
4 2013, a Notice Setting Court's Scheduling Conference (ECF #13) issued, triggering
5 the requirements of Fed. R. Civ. P. 26(a), (f), even though Defendant had yet to
6 Answer or responsively plead to the First Amended Complaint. Consequently,
7 Defendant hurried to file its Answer, Affirmative Defenses and Counterclaim on
8 December 17, 2013 (ECF #15) before in the Scheduling Conference and filed a First
9 Amended Answer, Affirmative Defenses and Counterclaim on January 3, 2014
10 (ECF #18). Plaintiff filed a Motion to Dismiss Defendant's Amended Answer,
11 Affirmative Defenses and Counterclaim on Friday January 17, 2014 (ECF #20), at
12 the same time that Judge Lasnik entered his order dismissing the identical First
13 Amended Complaint in the Western District.

14 Defendant Lamberson has moved to voluntarily dismiss its First Amended
15 Answer, Affirmative Defenses and Counterclaim without prejudice and under Fed.
16 R. Civ. P. 41(a)(2) and (c). The First Amended Answer was filed less than 21 days
17 ago. Allowing this dismissal without prejudice is in the interests of justice. If this
18 court is inclined to follow Judge Lasnik's ruling as to the identical First Amended
19 Complaint, Mr. Lamberson can file a new Answer, Affirmative Defenses and
20 DEFENDANT LAMBERSON'S MOTION
21 TO DISMISS PLAINTIFF'S FIRST AMENDED
22 COMPLAINT, OR FOR LEAVE TO FILE SECOND
23 AMENDED ANSWER, AFFIRMATIVE DEFENSES,
24 AND COUNTERCLAIM- 3

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1 Counterclaim as to any Second Amended Complaint that may result from such a
2 ruling. If this court is inclined to grant the pending Fed. R. Civ. P. 12(b)(6) Motion
3 with prejudice and without leave to amend, then defendant is satisfied with
4 withdrawal of its counterclaims and can proceed toward awardable costs of the
5 action.
6

7
8 B. The Interests of Justice Should Allow Defendant Lamberson to Join the
9 pending Fed. R. Civ. P. 12(b)(6) Motion.

10 A Fed. R. Civ. P. 12(b)(6) Motion to Dismiss is pending as to the First
11 Amended Complaint in the companion case (Case No. 2:13-cv-00115-TOR, ECF
12 #76.) The First Amended Complaint is identical to that which was also the subject
13 of a pending Fed. R. Civ. P. 12(b)(6) Motion (ECF #60) in the Western District of
14 Washington, Case No. 2:13-cv-00507-RSL. Judge Lasnik granted that Motion last
15 Friday January 17, 2014 (ECF #78), and this court is set to rule on an identical
16 Motion (by the same counsel, on the same briefing, as to the identical First
17 Amended Complaint.)
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21 Defendant Lamberson joins in the pending Motion to Dismiss and asks the
22 Court to grant it with prejudice or as ordered by Judge Lasnik.
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1 C. The Interests of Justice Should Allow Defendant Lamberson to File a
2 Second Amended Answer, Affirmative Defenses and Counterclaim.
3

4 If the Court does not allow Defendant Lamberson to withdraw and dismiss its
5 First Amended Answer, Affirmative Defenses and Counterclaim so as to allow it to
6 join the pending Fed. R. Civ. P. 12(b)(6) Motion, then Mr. Lamberson requests
7 leave to file its Second Amended Answer, Affirmative Defenses and Counterclaim.
8 The form of that proposed Second Amended Answer, Affirmative Defenses and
9 Counterclaim is attached as Exhibit 1.
10

11 Mr. Lamberson has recently amicably terminated his account with Comcast,
12 his Internet Service Provider. Mr. Lamberson's counsel was so informed over the
13 telephone in a call with Mr. Lamberson on January 8, 2014 . (Exhibit 2, Declaration
14 of J. Christopher Lynch at paragraph 2.) Consequently, his damages and potential
15 for continuing damages caused by the plaintiff's defamation and tortious
16 interference with Mr. Lamberson's relationship with Comcast have ended, and
17 Defendant proposes to drop its Counterclaims 4 and 6.
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21 Plaintiff filed a Motion to Dismiss (ECF #20) on Friday January 17, 2014; but
22 defendant's proposed Second Amended Answer, Affirmative Defenses and
23 Counterclaim directly addresses the majority of the points raised in that Motion by
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1 making amendments as to the allegedly improper form. (Exhibit 2, Lynch Dec. at
2 paragraph 3.)
3

4 Defendant will timely file its Opposition to Plaintiff's Motion, but offers this
5 Second Amended Answer, Affirmative Defenses and Counterclaim in the interests
6 of judicial economy and to streamline the proceedings by eliminating issues. This
7 offer is made in the alternative to defendant's motion to withdraw its responsive
8 pleading and to proceed to join the Fed. R. Civ. P. 12(b)(6) Motion pending in the
9 companion case.
10

11
12 Motions to Amend under Fed. R. Civ. P. 15 should be granted with good
13 cause shown and in the early stages of the proceedings as is the case here.

14 D. Conclusion
15

16 Consequently, Defendant Lamberson requests an Order (i) allowing
17 withdrawal without prejudice of Defendant's Answer, Affirmative Defenses and
18 Counterclaim and First Amended Answer, Affirmative Defenses and Counterclaim,
19 (ii) dismissing the First Amended Complaint, or in the alternative (iii) to allow
20 Defendant to file its proposed Second Amended Answer, Affirmative Defenses and
21 Counterclaim.
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1
2 DATED this 20th day of January, 2014.
3

4 LEE & HAYES, PLLC
5

6
7 By: s/ J. Christopher Lynch

8 J. Christopher Lynch, WSBA #17462

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26 *Counsel for Defendant Ryan Lamberson*

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of January, 2014, I caused to be electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Maureen C. VanderMay efile@vandermaylawfirm.com

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By: s/ J. Christopher Lynch

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